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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 252

JOHN R. BRINKLEY, PETITIONER,

versus

MORRIS FISHBEIN, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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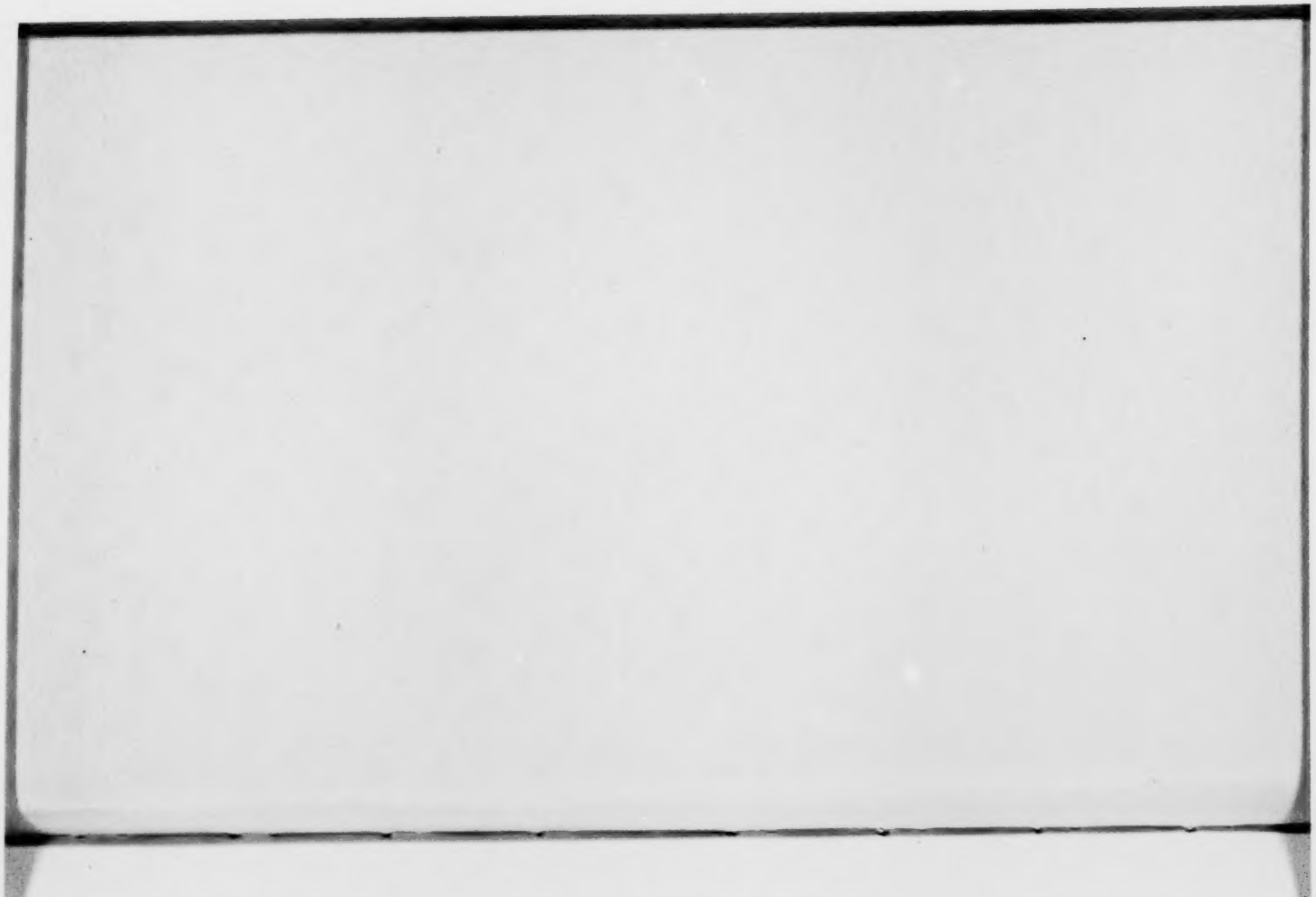

INDEX

Opinions of the Courts Below 1

Jurisdiction 1-2

Statement of the Issues 2-3

Argument and Authorities:

A. The trial Court's Charge Correctly Submitted the Defense of Privilege under Texas Law 3-6

B. The Evidence is Sufficient to Sustain the Defense of Truth of the Publication 6

C. The Court Correctly Permitted the Use of the Deposition Taken in a Former Case 7-8

D. The Circuit Court of Appeals Did Not Err in Sustaining the Ruling of the Trial Court Excluding the Testimony of Petitioner's Patients 8-10

Conclusion 10

LIST OF AUTHORITIES

Aetna Life Insurance Co. vs. Kelly, 70 F. (2d) 589 9
Amoskeag Mfg. Co. vs. Head, 59 N. H. 332 9
Article 5432, Revised Statutes of Texas 4

Chamberlayne's Modern Law of Evidence, Vol. 4, Sec. 3154 9
18 Corpus Juris, 750 8

Dallas Hotel Co. vs. McCue, 25 S. W. (2d) 902 10
Damm vs. Damm, 266 P. 410 8

Insured Life Fund Co. vs. Ward, 77 P. (2d) 890 8

McCormick and Ray, Texas Law of Evidence, p. 581 8
Missouri, Kansas & Texas Ry. Co. vs. Bailey, 115 S. W. 601 9

New England Trust Co. vs. Farr, 57 F. (2d) 103 9
North Texas Traction Co. vs. Gilbert, 282 S. W. 850 ..... 9, 10

Rule 26 (d) (4), Federal Rules of Civil Procedure 7

Scharlach vs. Pacific Mutual Life Ins. Co., 16 F. (2d) 245 9
Southern Power Co. vs. North Carolina Public Service Co., 263 U. S. 508 2

United States vs. Rimer, 220 U. S. 547 2

Yore vs. City of Newton, 80 N. E. 472 9

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I.

OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Fifth Circuit is reported in 110 F. (2d) 62, and is in the record at page 1165. The case was tried before a jury and no opinion was filed in the trial court.

II.

JURISDICTION.

The petition for writ of certiorari does not contain a statement particularly disclosing the basis upon which it is contended the Court has jurisdiction. It merely refers to the amount sued for and the statute providing for re-

view on writ of certiorari. This does not constitute compliance with Rule 38 and Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court.

The courts below had jurisdiction only by virtue of diversity of citizenship, and no constitutional question or question arising under federal law is involved. The petitioner seeks a review of matters arising on questions of fact determined against the petitioner by jury verdict in an action for libel governed by Texas law. The jury, by its general verdict, found the alleged libelous statements made the basis of the suit (a) were true, and (b) were fair comment and criticism and hence privileged.

The writ should be denied under the authority of *United States* vs. *Rimer*, 220 U. S. 547, and *Southern Power Co.* vs. *North Carolina Public Service Co.*, 263 U. S. 508.

III.

STATEMENT OF THE ISSUES.

The petitioner, under eight specifications of error, raises the following points:

A. Petitioner contends that the Circuit Court of Appeals erred in not sustaining his objections to the charge of the trial court submitting the defense of privilege under the Texas statute (Art. 5432) providing that a "reasonable and fair comment or criticism of * * * matters of public concern published for general information" shall be "deemed privileged and shall not be made the basis of any action for libel"; although the trial court submitted the defense in accordance with the State statute and State decisions with reference thereto.

B. Petitioner contends that the Circuit Court of Appeals erred in holding the evidence sufficient to sustain the defense of truth as found by the jury; although the substance

of every statement in the magazine article complained of was admitted to be true by Petitioner in his testimony on the trial of the case.

C. Petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court permitting respondent to read in evidence the deposition of James E. Crawford, taken in a suit between Petitioner and Respondent on substantially the same charge of libel brought in a district court of Kansas in 1930 and dismissed in 1934; such deposition having been admitted in accordance with Rule 26 (d) (4) of the Federal Rules of Civil Procedure specifically authorizing the use of the same.

D. Petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court excluding the testimony of 15 patients with reference to operations and medical treatments received by them and the results of such operations and treatments; although petitioner had testified as to the character of the operations and medical treatments and the results obtained and had been permitted the use of four expert witnesses on the same matter.

IV.

ARGUMENT AND AUTHORITIES.

A.

THE TRIAL COURT'S CHARGE CORRECTLY SUBMITTED THE DEFENSE OF PRIVILEGE UNDER TEXAS LAW.

Under his first, second, third, seventh and eighth grounds of error, petitioner complains of the action of the Circuit Court of Appeals in sustaining as correct the trial court's charge with reference to the defense of privilege under the Texas libel statute. The complaint under some of the specifications is that the Circuit Court of Appeals

erred in holding the alleged libelous statements to be privileged. The Circuit Court of Appeals made no such holding, but merely sustained the jury verdict and the correctness of the charge to the jury which contained instructions to the jury with reference to the defense of privilege.

The charge of the trial court is set out in the record on pages 1091 to 1113, inclusive. It instructs the jury with reference to the Texas statute (Article 5432, Revised Statutes) as applicable to the various states of fact which might be found by the jury from the evidence. To show that the charge presented to the jury all of petitioner's theories of liability and the law applicable thereto we quote from the charge the following:

> "Of course, you are the triers here of the facts and it is for you to determine whether upon the facts as you have heard them here this article constitutes a fair and reasonable comment or criticism of Dr. Brinkley and his activities. If you are of the opinion that his activities are of such a character as to render them a matter of public concern and that his conduct is unethical and that his claims are unwarranted then you are entitled to consider the question as to whether the defendant in writing this article has expressed his comment and opinion in such terms as to fairly carry those facts home to the public generally. There is no use blinking the fact that this article was intended to have a wide circulation. It was intended to carry the defendant's viewpoint of Dr. Brinkley's operations to everybody that he could get it to. If his viewpoint is correct, then his purpose and his action are highly laudable. On the other hand, if his viewpoint was incorrect and he proceeded upon a false premise, then his purpose and object was not laudable and he is liable in damages." (R. 1104).

The Court correctly instructed the jury that "matters of public health are matters of public concern," and it was not error for the Court to state "it occurs to me that as a matter of fact, and in discussing the facts with you, anything in a general way which affects the public health is a matter of public concern." (R. 1099). The Court did not charge the jury, as asserted by petitioner, that his (Brinkley's) conduct was, as a matter of law, a matter of public concern. This was left to the jury, and the jury by its general verdict in favor of respondent, resolved the matter on full and adequate evidence in respondent's favor.

Petitioner also contends under the above mentioned grounds of error that the statements contained in the libelous publications are statements of matters of fact as distinguished from matters of comment or criticism covered by the privilege statute. A reading of petitioner's pleadings will show that he complained of language constituting purely "comment and criticism." He framed his pleading so as to declare on only a small part of the magazine article and in the trial centered on the conclusion stated by the author that he was a "charlatan" and a "quack," both of which obviously constitute comment and criticism.

Petitioner also complained especially of the statement contained in the magazine article that the government should do something about his activities in connection with the use of the mails. This, again, is obviously a "comment and criticism" by the author on the admitted use of the mails by Brinkley in sending out thousands of copies of printed pamphlets containing lurid and fantastic claims of his ability to cure maladies, some of which he admitted were incurable. (See summary of these claims and references to the Record, pages 32-42 of Brief for Appellee in the Circuit Court of Appeals).

We submit that petitioner's contentions that error was committed in the portion of the Court's charge to the jury dealing with the statutory privilege accorded to comment and criticism under the Texas law are without merit.

B.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENSE OF TRUTH OF THE PUBLICATION.

Petitioner complains, under his fifth ground of error, of the statement made in the opinion of the Circuit Court of Appeals that "We are spared the necessity of discussing the assignments of error in detail and of reviewing the evidence. It is sufficient to say that the evidence of plaintiff, who was placed on the stand by defendant, tends to show the truth of the statements of fact complained of and we find no substantial evidence tending to show defendant was actuated by malice or that plaintiff suffered any actual damage compensatable in money." (R. 1167).

The finding of the Circuit Court of Appeals that petitioner Brinkley by his own testimony made admissions tending to show the truth of substantially all the matters of fact contained in the article is absolutely sustained by the record. On cross examination he admitted, in substance, the truth of each statement of fact contained in the entire magazine article. (R. 98-184; 499-534). The above mentioned statement from the opinion of the Circuit Court of Appeals was, of course, made with reference to the sufficiency of the evidence to sustain the jury verdict. This is a question arising on facts, which is not ordinarily reviewed by the Supreme Court.

C.

THE COURT CORRECTLY PERMITTED THE USE OF THE DEPOSITION TAKEN IN A FORMER CASE.

Under his fourth ground of error, petitioner contends that the Circuit Court of Appeals erred in sustaining the ruling of the trial court permitting respondent to read in evidence the deposition of James E. Crawford. This deposition was taken in a suit for libel brought by Brinkley against respondent Fishbein in the District Court of Geary County, Kansas, in 1930 and dismissed without trial in 1934. The Kansas suit was almost identical with the instant suit. It was based on an article written by respondent and published in the Journal of the American Medical Association, entitled "John R. Brinkley—Quack," and had as its central theme the fact that Brinkley was a quack and a man of "unsavory professional antecedents." The pleadings in the Kansas case and the order of dismissal for want of prosecution are set out in full in the record, commencing at page 1014.

The use of the deposition was permitted by the trial court under the provisions of Rule 26 (d) (4) of the Federal Rules of Civil Procedure, the relevant part of which reads as follows:

> "When an action in any court of the United States or of any state has been dismissed and another action involving the *same subject matter* is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor."

The use of a deposition taken in a previous case between the same parties, involving a different cause of action but identical issues, is uniformly permitted by the courts of the several states under statutes similar in their terms to the above quoted provision of Rule 26. See: *Insured Life Fund Co.* vs. *Ward*, 77 P. (2d) 890; *Damm* vs. *Damm*, 266 P. 410; *McCormick and Ray, Texas Law of Evidence*, p. 581; 18 *Corpus Juris*, 750.

Petitioner had full opportunity to, and did, cross examine the witness and read in evidence on the trial of this case a part of this cross examination.

D.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN SUSTAINING THE RULING OF THE TRIAL COURT EXCLUDING THE TESTIMONY OF PETITIONER'S PATIENTS.

Petitioner offered to prove by fifteen witnesses, drawn from the States of Kentucky, Oklahoma, Kansas, North Carolina, Missouri, North Dakota, Pennsylvania and Texas, that each of them had been operated on and treated by petitioner and that the operation and treatment had produced beneficial results. (R. 402-416). The testimony was excluded on the ground that the witnesses were called to testify to medical facts and to express opinions as to the result of surgical operations, and that, the witnesses being laymen, they were incompetent to testify as to these matters. The testimony was excluded on the further ground that to go into the physical condition of each witness before and after the operation and treatment by Brinkley would result in introducing collateral matters into the case and unduly and unnecessarily prolonging the trial and would open the opportunity to respondent to put on at least an

equal number of dissatisfied patients, which he announced he would seek to do. (R. 401).

Petitioner Brinkley himself testified to the treatment of over 5,000 patients and testified that he was successful in curing practically all of them. (R. 494). He was also permitted by the Court to use four medical experts, who were on the staff of his hospital, who testified, in substance, to the condition of patients who came into the hospital, the operative treatment, and the miraculous results secured. These experts were Dr. Petermeyer (R. 56), Dr. Davis (R. 538), Dr. Conn (R. 550) and Dr. Chandler (R. 557).

Petitioner's attorney stated what he intended to prove by these fifteen patients (R. 402-416) and the substance of what he expected to prove by them was that they had general ill health and distressing symptoms before they went to Brinkley, and that he operated on them and treated them, and that thereafter their health was excellent. This testimony would have been merely cumulative of petitioner's testimony and the testimony of his four experts and obviously would have had a tendency to unduly prolong the trial of the case by introducing a detailed inquiry into the physical condition of each of the fifteen alleged patients. The courts uniformly hold that this type of testimony should not be admitted. *Chamberlayne's Modern Law of Evidence*, Volume 4, Section 3154; *Amoskeag Mfg. Co.* vs. *Head*, 59 N. H. 332; *Yore* vs. *City of Newton*, 80 N. E. 472; *Missouri, Kansas & Texas Ry. Co.* vs. *Bailey*, 115 S. W. 601; *New England Trust Co.* vs. *Farr*, 57 F. (2d) 103.

This character of evidence is also inadmissible in that it involves testimony by a lay witness with respect to a medical fact, which the courts uniformly refuse to permit. *Aetna Life Insurance Co.* vs. *Kelly*, 70 F. (2d) 589; *Scharlach* vs. *Pacific Mutual Life Ins. Co.*, 16 F. (2d) 245; *North*

Texas Traction Co. vs. *Gilbert*, 282 S. W. 850; *Dallas Hotel Co.* vs. *McCue*, 25 S. W. (2d) 902.

CONCLUSION.

This case was tried in the trial court before a jury and was decided against petitioner on issues of fact properly submitted to the jury. We respectfully submit that the District Court and the Circuit Court of Appeals correctly disposed of the case and that the writ of certiorari should be denied.

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